THE NEW-YORK
CITY-HALL RECORDER.

VOL. V. *January*, 1821. NO. 13.

AT a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of said City, on *Monday*, the 1st day of *January*, in the year of our Lord one thousand eight hundred and twenty-one.

PRESENT

The Honourable

CADWALLADER D. COLDEN, *Mayor.*

THOMAS S. TOWNSEND, } *Alder-*
LEONARD KIP, } *men.*

P. C. VAN WYCK, *Dist. Att.*
J. W. WYMAN, *Clerk.*

(GRAND LARCENY—COUNTERFEITING—EXAMINATION.)

TELLESPHORE ROBETAILLE'S Cases.

VAN WYCK, *Counsel for the prosecutions.*

DAVID GRAHAM, RODMAN, and LEMOINE, *Counsel for the prisoner.*

The Court will not hear the affidavit of a prisoner read, for the purpose of putting off his trial, containing facts, in addition to those contained in another previously read, on which such motion had been denied.

Declarations made by the prisoner at the time an offence is committed, may be given in evidence in his favour, as part of the *res gestae*, but not those made subsequently.

The magistrate before whom an examination is taken, is a competent witness to testify to acts done by the prisoner before him, but not to declarations forming part of such examination.

Where a prisoner, in his examination before a magistrate for a specific offence, discloses matters material to the prosecution on the traverse of an indictment for another offence, it was held that such examination might be read on the traverse of each indictment.

Examinations of prisoners before a magistrate stand on the same footing, in Courts of Justice, as their declarations reduced to writing before any individual would.

The prisoner, a young man about twenty-three years of age, of good external appearance, was indicted for grand larceny, in stealing one bank note of $20, and two of $10, and of the several other inferior denominations in circulation, and fifty ten cent pieces, the property of the President, Directors and company of the Bank of New-York, on the 22d day of November last; and he was also indicted for counterfeiting, passing, and having in possession, with an intent to pass, a $3 counterfeit bill on the Newark Banking Insurance Company, knowing it to be counterfeit, on the 25th of the same month.

When the prisoner was brought to trial, the day preceding to that on which he was tried, his counsel read an affidavit, stating, that his father, living in Upper Canada, a Representative to the House of Assembly, had been written to, and was expected by the prisoner with witnesses as to his character. On this affidavit the Court refused to postpone the trial, and on the day of the trial, the counsel offered to read another affidavit of the prisoner, of the want of material testimony.

The Mayor pronounced the decision of the Court, that such affidavit should not be read, on the ground, that to permit a prisoner to make an affidavit, containing facts which must have been in his knowledge at the time a previous one was made, on which a motion to postpone his trial had been denied, would be a temptation to commit perjury.

On the traverse of the first mentioned indictment, Cornelius Heyer, Assistant-Cashier of the Bank of New-York, testified, that on the evening of the day laid in the indictment, at about ten o'clock, he received information, that the bank had been broken open; and, hastening thither, he found that the outer door was open, having been opened by some person from the inside, who had concealed himself in the bank before it was closed in the afternoon.

On examining his desk, he found that it had been broken open, and a $20 bank bill, $5 in ten cent pieces, three or four quarter eagles, and other bank bills, which, with the other money, amounted to from $70 to $110, were stolen. The $20 bill, the ten cent pieces, the two $10 bills, and

the gold, was the only money the denomination of which he recollected; but the other bills must have been of denominations inferior to tens. The ten cent pieces were rolled up in a letter, which had been written and directed to Charles Wilkes, Esq. Cashier of the Bank, inclosing notes for discount, and the $20 bill the witness had seen in the desk, from day to day, for sometime before it was stolen. In addition to this money, there was a quantity of counterfeit bank bills, which had been stopped at the bank, taken from the desk at the same time. Among these there was one genuine $2 bill on the Phoenix Bank, which had been altered to a ten. This bill, with a number of counterfeit bills pasted on paper, was shown to the witness by the district attorney, on the trial, and identified.

It appeared, from the testimony of Jacob Hays, that, on the 27th of November last, he arrested the prisoner at No. 8 Canal-street, while he was in the bed of Ann Tingley, who was not then in the room, and brought him to the police, on a charge for passing counterfeit money; and, after he had arrived there, he said that his trunk was at the City-Hotel, room number four, but that if the officers searched it, they would find nothing except one counterfeit bill. He gave the witness the key of the trunk, and on going there and searching it, he found the fifty ten cent pieces rolled up in the letter to Wilkes, and carried it with the contents to the bank, where Mr. Heyer stated, that it was the same that was taken out of his desk.

James Warner, one of the police magistrates, testified, that when the prisoner was brought into the office, he went near a window; and the witness, on receiving information from a coloured man in the office, that the prisoner had thrown something down, went there and found the counterfeit bills, chewed together, and very wet; and, on asking the prisoner either whether he had put them there, or why he did so, he acknowledged that he chewed and threw them there.

Samuel Montgomery, one of the police officers, testified, that he went with Hays, and arrested the prisoner; and, after he had been searched by that officer, and nothing found on him, he went to a bureau in the room where he was arrested, and put on a waistcoat. After the bills had been found in the police-office by Warner, as before related, the witness asked the prisoner where he concealed the bills, so that Hays, when he searched, could not find them, and he replied, that they were in the pocket of the waistcoat he put on afterwards.

The examination of the prisoner, which was read in evidence, stated, that he came in this city about a month ago from Montreal, and lodged in the City-Hotel; that he brought with him $100 in gold, and met with a man named Johnson in the street, with whom he previously became acquainted at the theatre; and, in the street, Johnson changed the gold, and gave him good money, which he has since spent in riding about and frolicking; and Johnson, at the same time, gave him the counterfeit bills which he chewed up, telling him to pass them if he could, &c.

Stephen P. Lemoine, on behalf of the prisoner, testified, that the relations of the prisoner were very respectable in Upper Canada, his father being a representative to the Assembly, and independent; that the prisoner was a student of medicine there with a gentleman, with whom the witness was acquainted; and, as he understood from a relation of that gentleman in this city, the prisoner came here for the purpose of prosecuting his studies.

Ann Tingley, (*dressed in a fine blue coat, made in the first style,*) on the same side, testified, that during the week in which the felony was committed, the prisoner was at the house in which she resided, in Canal-street, from about three o'clock in the afternoon, and after dining at the City-Hotel, until the next morning; that he was constantly in her company, and staid during the several nights in the same room with her; that, during the week, he went with Mrs. Wheeler and herself in a carriage out of town, and the same Wednesday evening that the bank was opened, she was sure that he was with her, and, as she believed, at the theatre. She had received but very little money from him, and she had to pay nearly the whole of the price of the coat she had on, which he undertook to buy and present to her.

Hays, on being again called, testified, that Ann Tingley was a common prostitute.

After the Jury had been addressed by Graham, for the prisoner, and the opposite

counsel, the Mayor charged the Jury, that to convict the prisoner they must be satisfied that a felony was committed. Of this there could be no question; and the only one was, whether the prisoner stole the whole or any part of the property laid in the indictment. After recapitulating the facts in the case, the Mayor left it as a matter of fact to the Jury, whether the money, or a part of it, stolen from the bank, had not been satisfactorily traced to the possession of the prisoner; and, if so, he was bound, if it was in his power, to give a rational account of such possession. Could the Jury believe the account given by him of his possession of the counterfeit bills from Johnson; and what account has the prisoner given of the ten cent pieces found in his trunk? It is true, that if the Jury could believe the testimony of this woman, there was an end to the case; but if they did so, it would be in opposition to the strongest circumstantial testimony.

The Jury found him guilty.

On the traverse of the other indictment, Sarah Jeffreys, a witness on behalf of the prosecution, testified, that the prisoner, who passed by the name of *Borbain*, having engaged a lady's coat of fine blue cloth of her husband for $40, on the evening of the 25th of November, being on Saturday, came to the house, and left for her husband $18 towards the coat, saying, at the same time, that he owed him $2 more. Among the money which he paid, was the counterfeit bill laid in the indictment, and a spurious guinea, (as she afterwards ascertained from Mr. Dodge,) which the prisoner told her was of the value either of $4 50 or $5 50; and, at this time, he left his own coat in pledge for the residue of the money due.

On her cross-examination, the witness testified, that she knew the bill by the mark put on it by her husband in the police; that soon after receiving the guinea, it was carried to Mr. Dodge, a goldsmith, who pronounced it spurious; that when she took the money, she expressed no suspicion as to its being bad, having none; and that the prisoner came to the house the next morning at nine.

His counsel asked the witness what were his declarations, in his own favour, at that time; but, on an objection to the inquiry, the Mayor said, that though his declarations at the time of passing the bill, might be given in evidence as part of the *res gestae*, yet to allow declarations made by him at a subsequent time, in his own favour, to be given in evidence, would be a palpable violation of all rule.

The witness proceeded to state, that when the prisoner came the next morning, he offered to pay her husband in genuine money, and asked him more than thrice to deliver the bills he had left the preceding evening; and, on a peremptory refusal, begged that he would destroy them. When the prisoner first came that morning, he asked the witness whether the lady's coat had been sent home. The witness answered, that it had not; and he inquired the reason, when she told him, that he had passed to her counterfeit money. He then said, that he was a stranger from Canada, and did not know good money; to which her husband, whom she had called into the room, replied, that if he did not know good notes, he surely must have known the guinea to be bad. The prisoner departed, but came again in about half an hour, and inquired whether any one had been there for the lady's coat; and he was then very solicitous to know whether her husband intended to trouble him on account of the notes, and he said he would not.

A paper was here produced to the witness with the words, "Mr. Borbain, No. 4 City-Hotel," and below this, "Miss Tingley, 8 Canal-street." The witness testified, that the address of the prisoner was written by him, and the other according to his direction, by her husband, when he engaged the coat.

James Warner was called on behalf of the prosecution, to testify to the same facts, in relation to the prisoner's chewing the bills, as on the preceding trial.

Graham objected to the evidence on the ground that the parol testimony of the magistrate, who takes the examination of the prisoner, could not be given in evidence, inasmuch as the statute of our state, which is a transcript of that of William and Mary, requires him to reduce such examination to writing, and this speaks for itself.

The Mayor delivered the opinion of the Court, that the transactions of this prisoner in the police might be given in evidence. The statute of William and Mary

has no application to the case, for an examination under that statute may be taken when the prisoner is not present. But the present examination stands on the same ground as any declarations of the prisoner, reduced to writing by any other individual would. It is true, that the magistrate shall not be called upon to supply, explain away, or contradict any facts contained in the writing; but, where he is called upon to testify to the acts of the prisoner before him, which were not, and, perhaps, could not be reduced to writing, he is a competent witness for that purpose.

Justice Warner hereupon testified to the same facts as on the former trial.

Van Wyck offered to read the same examination of the prisoner as he had read on the former trial; and he admitted, that it was taken in the case of grand larceny.

Graham objected to the introduction of this evidence on the ground, that the examination was not taken in this case, and that the magistrate ought not to mix up cases in this manner.

The Mayor pronounced the decision of the Court, that this examination, purporting to be the written declarations of the prisoner, was good evidence. Where a party is brought before a magistrate, charged with several distinct offences, there is no necessity, nor is it the practice, to have a separate examination for each offence. One is sufficient.

Cornelius Heyer testified, that the bill laid in the indictment, and also those pasted on paper before mentioned, except the $2 bill altered to a $10, were counterfeit; and that one $10 bill of the Phoenix Bank at Hartford, No. 532, and a $2 bill of the Patterson Bank, No. 1951, which were handed him, on the trial, by the district attorney, were also counterfeit.

Orsimus Willard, a clerk of Mr. Jennings, at the City-Hotel, testified, that the prisoner on settling a bill there a few days before his arrest, paid $70, and among the bills paid by him was the $10 of the Phoenix Bank, No. 532.

Thomas Bower testified, that the prisoner purchased a pair of gloves of him for $1 75, and passed to him the bill on the Patterson Bank, No. 1951.

John Dodge testified, that Mrs. Jeffreys brought him the guinea, which he satisfactorily ascertained to be spurious.

Michael Jeffreys testified, that the bill laid in the indictment, and the spurious guinea, were passed to his wife by the prisoner; and that it was at the suggestion of a neighbour, that the witness lodged a complaint in the police against the prisoner.

The case was submitted by the respective counsel, without remark, to the charge of the Mayor, who merely observed to the Jury, that the material question for them to determine was, whether the prisoner, at the time he passed the bill laid in the indictment, knew it to be bad; and, that on this question, it was incumbent on them to recur to the facts and circumstances of the case. The testimony in the case appeared to be all on one side; it was difficult, if not impossible, to find a single circumstance in his favour. He is not only found habitually engaged in passing bad money, but we find that the only money found on him was counterfeit.

The Jury immediately found him guilty, and on the last day of term, he was sentenced to the state prison ten years.

(EVIDENCE—EXAMINATION.)

JAMES M'KENNA'S Case.

VAN WYCK, *Counsel for the prosecution.*

DAVID GRAHAM, *Counsel for the prisoner.*

Whatever is reduced to writing before a magistrate, and forms part of the examination of the prisoner, is not the subject of parol testimony.

To convict of grand larceny, the Jury must be satisfied that the prisoner stole property to the amount of more than twenty-five dollars, set forth in one and the same count in the indictment; and they cannot take a part of that sum contained in one count, and add it to a part in another count, where they find the amount of the property stolen in each count to be less.

The prisoner was indicted for grand larceny. The indictment consisted of two counts, the first of which alleged, that the prisoner, on the 21st day of December, 1820, stole one check for the payment of money, commonly called a bank check, directed to the Cashier of the Bank of New-York, for the payment of twenty-five dollars to —— or bearer, signed by Henry Brevort, and dated on the 16th of December, the money in the said check being

then due and unsatisfied; and for stealing one pocket-book of the value of twelve and a half cents, the property of Alexander Robertson. The second count charged the prisoner with stealing four promissory notes, commonly called bank notes, of $10 each, the property of the same person.

It appeared, from the testimony of Alexander Robertson, that on the evening of the day laid in the indictment, he attended the theatre in this city, to witness the performance of Macbeth by Kean. He found the pit, where he was, much crowded, particularly on the right hand side. On the other side of him, the pressure of the crowd was less; and on this side the prisoner stood until the third act had commenced, when he said to Robertson, "Sir, I think there is room enough, and you can see better if I stand on the other side behind you." He then removed on the other side. The pocket-book was in Robertson's right coat pocket, and he had on a surtout. After he arrived at the theatre, and found he had his pocket-book, with a considerable sum in it, that is to say the check, four $10 bills on the Bank of America, and two or three single dollar bills, he knew it to be imprudent; and, for that reason, several times during the performance, he felt round to ascertain whether the pocket-book was there, and found it safe. At length he missed it: and, without imparting the matter to my one present, went instantly to Jacob Hays, who was stationed near the door, and he came immediately into the pit, near where Robertson sat, and looked about to see if he could discover any of his acquaintance, on whom a well grounded suspicion would rest. No discovery having been made, Robertson returned home, and the next morning, before bank hours, went to the bank, and stopped the payment of the check, leaving a line for Mr. Heyer, requesting him to stop the person who should present the check. When the pocket-book was stolen, both coats were cut through with some sharp instrument.

Jacob Hays, on being sworn, testified, that on receiving information from Robertson of his loss, he went immediately to the door-keeper, and inquired whether any, and what persons had left the theatre, and found that only one person had gone out, and that person the witness knew. He then went into the pit, where Robertson had been, and saw the prisoner, with others, standing there. The next morning he was brought to the police, and examined by Justices Christian and Gardner, and denied that he was at the theatre the preceding evening; and the witness having understood from them, that he denied the fact, said in his presence, "Mr. M'Kenna will not tell me he was not at the theatre:" and he then acknowledged that he was there.

This witness, in his cross-examination, being asked whether he had any suspicion of the prisoner when he saw him in the pit, answered, "There was no man I saw there of whom I was more suspicious than of him, for I knew him well."*

Cornelius Heyer, Assistant-Cashier of the Bank of New-York, testified, that on the morning of the 22d of December, he found on his desk the line from Mr. Robertson, directing him to withhold payment of the check; and, in about ten minutes after ten o'clock, a little boy brought to the bank, and presented the check for payment. The witness inquired of the boy where he got the check, and he answered, that he got it of a man in the street. The witness asked him to point out the man; and, on looking through the window, he pointed out one. The witness then folded up a piece of blank paper, and told the boy to give it to the man. The boy then left the bank, followed by the witness, and near the post-office, in William-street, the boy overtook the prisoner, who was walking slowly down the street, and gave him the paper; and, after he had received it, he walked much faster than before, and looked behind him several times. The witness overtook him near Beaver-street, and related to him the facts, when he disclaimed all knowledge of the boy. The prisoner then readily returned with the witness to the bank, and in charge of one of the porters, went to the police.

John Bean, a very intelligent boy of twelve years old, on being examined and instructed by the Court, in relation to his duty as a witness, testified, that being a servant in a boarding-house in Pearl-street, he was sent with a letter to the post-office; and, near the steps of the office, the prisoner gave him the check, and told him that

* About a year ago he was tried in this Court for passing counterfeit money, but was acquitted.

he would give him half a dollar if he would carry it to the bank. He did so; and, after he came to the bank, the gentleman asked him where he got it, and he said, of a man in the street; and the gentleman then asked him to show the man, and he looked through the window, and saw the prisoner peeping round the corner of William-street, and pointed him out. On overtaking him, the witness reached him the paper, and he held out his hand to take it, but it dropped on the ground from the hand of the witness, who then picked it up, and delivered to him, asking him for the half dollar. The prisoner, after having felt of the paper, tore it up; and, without regarding the demand of the money by the witness, walked off; and, shortly afterwards, was overtaken and seized by the gentleman.

The witness, through a critical cross-examination, answered promptly and consistently.

Charles Christian, one of the police magistrates, testified, that the boy immediately pointed out the prisoner when he was brought to the police for examination. The charge was, that the felony was committed at the theatre, and he denied that he was there.

By the Mayor. Was this while he was under examination?

A. It was. I put the question to him, and I considered this as part of his examination.

The Mayor. Parol evidence cannot be given of any declaration made by the prisoner while under examination; and I consider that this denial spoken of by the magistrate is not proper evidence.

Graham summed up the case to the Jury, and strennously contended, that the question of the guilt or innocence of the prisoner depended on the testimony of the boy; and that, from a variety of considerations which were urged, and especially, that the boy might be mistaken, with regard to the identity of the prisoner whom he overtook in the street, that the Jury had not that legal certainty requisite to convict a man of this offence.

Van Wyck, contra.

The Mayor charged the Jury, that although the prisoner was charged with a grand larceny, it was competent for them to mitigate the offence to petit larceny. That to convict of the higher offence, the Jury must be satisfied that the prisoner stole more than $25, specified in one or the other counts of the indictment, and that they would not be at liberty in taking a part of that sum contained in one count, and adding it to a part in another count, for the purpose of making out a sum greater than $25; that though it was usual for the Court to instruct Juries, that it would be more discreet to render a verdict for petit larceny than grand larceny, where the amount of the *article* or *articles* stolen was but little more than $25, yet, it was competent for them to render a verdict for grand larceny where the amount stolen was any thing over that sum; and, in this case, should the Jury believe that the prisoner stole the property, in the manner disclosed in proof, there would be little reason for the adoption of that humane principle.

After recapitulating the facts, the Mayor charged the Jury, that their verdict must depend on the credit to be attached to the boy's testimony; for, if he was believed, a part of the stolen property has been traced to the possession of the prisoner, and he has given no account of such possession. The facts which took place at the theatre, show that the prisoner was in a situation in which he might have committed the felony, but these were but circumstances corroborative of the boy's testimony.

The Jury convicted the prisoner, and on the last day in term, he was sentenced to the state prison seven years.

(COUNTERFEITING—VARIANCE—EVIDENCE.)

ANTHONY SILKWORTH'S Case.

VAN WYCK, *Counsel for the prosecution.*

SCOTT, *Counsel for the prisoner.*

A bill on a particular Bank, alleged to be counterfeit, cannot be proved to be so by a witness who testifies merely from its general appearance, without knowing even the names of the President and Cashier of the Bank.

A bill, alleged to be counterfeit, was set forth as a bill on a particular bank; but, on the face of the bill, a joint promise was set forth, commencing with the words, "We promise to pay, &c." to A.

B. "at the Bank," &c. and purporting to be signed by persons, as President and Cashier, who were not, in fact, the officers of that Bank; and, for aught that appeared, were fictitious persons; it was held, that in such a shape the prosecution could not be maintained.

The prisoner was indicted for counterfeiting, passing, and having in possession, with an intent to pass, one counterfeit note on the *Commercial Bank of Pennsylvania*, set forth in the indictment as a note of $10, No. 829, letter A, being in the following words and figures:

"We promise to pay to D. Williams, or bearer, on demand, at the Commercial Bank of Pennsylvania, ten dollars.

Phil. Nov. 10*th*, 1819.

John G. Fritz, Cashr.

Robert H. Garwood, Pres."

with an intent to defraud Garret Brested, Ero Dorsey, and the President, Directors, and Company of the Commercial Bank of Pennsylvania, against the form of the statute, &c.

The bill, on being produced in evidence, was headed with the words, "Commercial Bank of Pennsylvania."

Rufus Bunnel, on being produced as a witness, testified, that he is a broker in this city, had resided in Philadelphia, and was acquainted with the bills on the Commercial Bank; that the one produced was a counterfeit, and that he had no recollection that there was ever a President and Cashier of the names on the bill.

By the Mayor. Q. Mr. Bunnell, from what do you judge that this is a counterfeit?

A. From the engraving, and general appearance of the bill.

Q. What is the name of the President and of the Cashier of that Bank?

A. I do not recollect.

Q. If you do not know who is the President and Cashier, how do you know the note is bad?

A. Brokers are in the daily habit of inspecting bills of the banks; and, though we may not know the names of the President and Cashier of a bank, still, from the engraving, the general appearance, and from various other matters, we are able to distinguish a good bill from a bad one.

Q. Mr. Bunnell, I wish you to examine the particular phraseology of that bill, and say if you ever saw a bank bill commencing with the words, "We promise?"

A. I never did.

The Mayor said, that this testimony was not satisfactory. To prove a bank note to be counterfeit, it was incumbent on the public prosecutor to produce some person who knew the hand writing of the President and Cashier, or had been in the habit of corresponding with them, or of receiving and returning their notes. This witness does not even know who are the officers of the bank.

Van Wyck offered to make out the case to the satisfaction of the Court and Jury, and proceeded to introduce Garret Brested as a witness, who testified, that the prisoner passed the note to the brother of the witness, and afterwards said he received it from one Dr. Davis, and offered to take it back, and pay $3 a week until he had paid the amount.

The Mayor, at this stage of the case, said, that he thought it to be his duty, for the purpose of saving time, to explain to the counsel his view of the case. He did not think that this prosecution could be maintained. In the indictment, this bill is set forth as a counterfeit on the Commercial Bank of Pennsylvania, and, it is alleged, that it was passed with an intention of defrauding that bank; but, on the face of the bill, it purports to be a joint promise, commencing with the pronoun *we*, and to be signed by Robert H. Garwood, President, and John G. Fritz, Cashier; and, for aught that appears, these are fictitious persons. If so, surely this prosecution, in its present shape, could not be maintained, for the note is not a forgery on the bank. It is true, that if a man fraudulently passes a false instrument, signed with names of persons not in existence, he may be indicted and punished; but, then, the indictment should square with the offence.

The Jury, being charged on the principles contained in the above decision, immediately acquitted the prisoner.

(INFANCY—CONFESSION.)

GEORGE STAGE'S Case, and HARRIS KELLET, HIRAM MILLS, and ISAAC ROBBINS' Case.

VAN WYCK, *Counsel for the prosecution.*

N. B. GRAHAM, *Counsel for Stage.*

DAVID GRAHAM, *for the others.*

If the circumstances under which a felony is committed by an infant, between seven and fourteen years of age, indicate that he was conscious that he was doing wrong while stealing, this is tantamount to evidence of his capacity.

Where a confession made under the influence of a promise, is accompanied with the possession of the stolen goods, the prisoner is bound to account for such possession.

Where a confession is made in the police, subsequent to one extorted, it shall be left to the Jury to determine, whether the prior influenced the latter confession; and, if it did, it is to be rejected.

The prisoners were all infants, between seven and fourteen years of age. The one first named was indicted for a grand larceny, in stealing a lady's dressing box, containing several pair of pearl ear-rings, a necklace, a breast-pin, and other valuable articles of jewelry, of the value of $150, the property of George Hearsey, on the 25th of November last; and the other prisoners were indicted for petit larceny, in stealing a bearskin, the property of Charles Dickinson, on the 31st of December last.

On the traverse of the first mentioned indictment, it appeared from the testimony of Eliza Hearsey, the lady of George Hearsey, that on the day laid in the indictment, she saw the prisoner going out of the entry of the house with the box, which was taken from her bed-chamber, under his arm, endeavouring to escape out of the back door; and, when she seized him, for the purpose of getting away the box, he tried to bite her, and retain it by force. He cried, and alleged that another boy had told him to take it away. He told the lady that he was eight years old.

There was no other evidence of capacity offered; and, after the remarks of the respective counsel, the Mayor charged the Jury, that with regard to an infant, between the age of seven and fourteen, the Jury should be satisfied that he had a capacity of knowing good from evil. And proof of this may be given either by extrinsic testimony, or it may arise from the circumstances of the case. In this case, the fact of concealment, and of an attempt to escape, appear; and it will rest with the Jury to determine, whether this boy did not know, at the time he stole this property, that he was doing wrong.

He was convicted, and sentenced to the state prison three years.

On the traverse of the other indictment, it appeared by the testimony of Charles Dickinson, that the bearskin was stolen out of his stable, and concealed in an oven in an adjoining yard. He did not see the property in possession of the prisoners; but, in a short time after it was stolen, the prisoners were brought to his house, and, on his threatening that if they did not confess the fact, he would send them to bridewell, they acknowledged that they stole it, and concealed it in the oven where it was found. One of the boys accused the others of inducing him to commit the theft, and they were all detained in the prosecutor's yard, until Azel Conklin was sent for, to whom they made a similar confession; and, on being carried into the police-office the next morning, made an ample confession before one of the magistrates.

David Graham addressed the Jury on behalf of the prisoners, and insisted, that the confession made to Mr. Dickinson, being made under the influence of threats, influenced those made subsequently; and, therefore, the whole ought to be rejected.

Van Wyck, contra.

The Mayor charged the Jury, that if they believed that the confession made in the police was influenced by that previously made to the prosecutor, it ought to be rejected; but the Mayor thought that this confession ought to be considered as standing on a different ground from the confessions made to the prosecutor, and afterwards to the officer. The confession made in the police was on the next day, and no threats are ever used there to extort a confession. But, in this case, there is fact independent of any confession.

The property was found concealed in an oven, where the prisoners acknowledged it to be. This is good evidence.

Kellet, on being arraigned, pleaded guilty; and the others were convicted by the Jury, and the whole sentenced to the penitentiary three years.

(POSSESSION OF STOLEN PROPERTY.)

ROBERT SALES' Case, *ind.* with JOHN WILSON.

VAN WYCK, *Counsel for the prosecution.*

COURT, *Counsel for the prisoner.*

The possession of stolen goods is not always evidence that the prisoner is the felon; and such possession may be accompanied with circumstances which destroy the presumption of guilt.

The prisoner was indicted with Wilson, (see summary for December, 1820,) for grand larceny, in stealing a time-piece, of the value of $40, the property of Joseph Kissam, on the 23d of November last.

The time-piece was stolen, and soon afterwards a part of it was brought by the prisoner to John I. Hart, a watchmaker, in Chatham-street, and offered for sale. Hart having been previously requested by a lady in Harman-street, who had lost a clock, to take care of it for her if it should fall into his hands, from the description, supposed this to be a part of that, and asked Sales, where he lived, and he readily told him either 28 or 42 Pell-street. Hart then told him, that he wanted the other part of the clock, and the prisoner said that he thought he could get it of the man of whom he got the part brought, and that he would bring it within a specific time. He did not come within the time; and the witness, in company with Mr. Bolmer, a neighbour, called on the prisoner at the place where he said that he lived, when he said that the man of whom he got the other part had gone off, and he did not think he could get the whole of the clock. Mr. Bolmer had a confidential conversation with the prisoner, who shortly afterwards brought the other part to the shop. Having ascertained that the article was not the lady's, and that it belonged to Kissam, Hart restored it to him complete.

The allegation of the prisoner on the trial was, that Wilson gave him the clock to sell.

The Mayor, in his charge, submitted to the Jury whether the possession of this article by the prisoner, in itself, was sufficient evidence that he was the thief. The rule is, that where stolen property is found in the possession of a man, he is bound to account for such possession satisfactorily, or he is to be considered as the thief. But that general rule has this qualification: he is bound to account satisfactorily for such possession, should the Jury, from the facts and circumstances of the case, believe that it is in his power, or that he is in a situation to do so. Here a part of the stolen property, in the first place, was brought by the prisoner to Hart, and offered for sale. Hart is solicitous for the remainder, and asks the prisoner where he lives, who readily informs him, and offers to bring the other part within a given period. He does not come, and Hart, with his neighbour, calls on him, when he said, that he did not think he could get it, for the man of whom he had the other part had gone off. However, in a short time afterwards, he brings the other part. His allegation now, as it was before, is, that he got the article of another person for sale. His telling the place of his residence is a circumstance in his favour, and it will rest with the Jury to say, whether it is in the power of the prisoner to give a more satisfactory account of the possession of the article than he has done, and whether such possession is not accompanied by circumstances which destroy the presumption of guilt.

The prisoner was acquitted.

(COUNTERFEITING—INDICTMENT.)

LOUIS LAMPIER'S Case.

VAN WYCK, *Counsel for the prosecution.*

PRICE, *Counsel for the prisoner.*

Where a quantity of counterfeit bills is found in the possession of a man at the same time, he cannot be subjected to more than one prosecution for counterfeiting, passing, and having them in possession, with an intent to pass them, as this is but one offence.

An objection to one of the members of the Court sitting to try a prisoner, on the ground of interest, should be made before witnesses have been sworn, and the trial has progressed.

There were two indictments found against the prisoner, the one for counterfeiting and having in possession, with an intent to pass, one counterfeit $2 bill, on the Franklin Bank, and the other for the same offence, in relation to a $5 counterfeit bill on the New-Brunswick Bank, on the 25th day of December last.

After the Jurors had been sworn, on the traverse of the first mentioned indictment, and several witnesses had been examined, Price objected to the further trial of the case, on the ground, that one of the members of the Court was a director of one of

the banks, whose paper, in the indictment, was alleged to be counterfeit.

The Mayor said, that though this objection might be a good one, yet he was inclined to think that it came too late, as the trial had progressed.

The objection, however, was waived, and the trial progressed.

The bills of the Franklin Bank having been proved to be counterfeit, Jacob Hays testified, that on Christmas-day, having received information from John Conner, that the prisoner had made an appointment to meet him in the suburbs of the city, opposite to Rutgers' church, the witness went there with Conner, and saw the prisoner go forward of Conner to a rock, and draw out something and put it into his bosom. The witness then went up and arrested the prisoner, and took out of his bosom a roll of counterfeit bills, amounting to $986. There were 101 $5 bills on the New-Brunswick Bank, 11 twenties of the Montreal Bank, 36 fives on the Brunswick Bank, and 41 two dollar bills on the Franklin Bank.

The whole of the bills were satisfactorily proved to be counterfeit, and the district-attorney was about calling the attention of the Jury to the second indictment, which, by consent, they had been sworn to try at the same time.

Price raised an objection to proceeding on the second indictment, as it appeared from the testimony that all the bills were found in possession of the prisoner at the same time. This, therefore, was but one offence.

Van Wyck argued, that the prisoner might well be tried on this indictment, as the possession of each bill was a distinct offence.

The Mayor pronounced the decision of the Court, that the public prosecutor could not, under the evidence, proceed to the trial of the second indictment. As well might a prisoner who should steal fifty several articles, amounting to more than $25 each, at the same time, be tried on fifty separate indictments. There is no difference in principle between the cases.

The first mentioned case was submitted under the charge of the Court, and the Jury immediately convicted the prisoner. By consent of the public prosecutor, a Juror was withdrawn in the other case.

On the last day in term, the prisoner was sentenced to the state prison for life.

(FRAUD—FALSE PRETENCE.)

SAMUEL SMITH, *al.* CAPTAIN JUBEN'S Case.

VAN WYCK, *Counsel for the prosecution.*

SCOTT, *Counsel for the prisoner.*

For a man falsely to pretend that he is the captain of a vessel from a foreign port, just arrived; and, by that means, to obtain goods, is a false pretence within the act.

The prisoner was indicted for obtaining $5 in cash, and various articles of groceries, specified in the indictment, from Henry F. Blackwell, on the 18th of December last, by falsely pretending that he, the prisoner, was the captain of the schooner Sally, of Newbern, in N. C. loaded with staves and turpentine, then lying at one of the wharves in this city.

It appeared from the testimony of Blackwell, that on the evening of the day laid in the indictment, after candle light, the prisoner called at his store, and inquired of him where Messrs. Baker and Kissam, lumber merchants, resided, and on being informed, said, that his name was Captain Juben, of the schooner Sally, of Newbern, in North Carolina, loaded with staves and turpentine, then lying at the dock, and requested the witnesss to advertise the cargo. He left the store; and, in about an hour afterwards, returned, and said he had disposed of the cargo. After staying some time in the store, he asked the witness for some supplies; alleging, as a reason for the request, that he had been for some time on the passage, and his stores were exhausted. The witness, believing these representations to be true, and placing entire reliance on them, let the prisoner have the *needful supplies*, being the articles laid in the indictment; and, on his request, advanced him $5 in cash.

The prisoner departed, and the prosecutor, shortly afterwards, made every inquiry for Captain Juben, of the schooner Sally, of Newbern; and, from the best sources of information, ascertained that no such captain was in the trade.

There was no defence, and the case was submitted by the respective counsel without remark.

The Mayor instructed the Jury, that if they believed the testimony, it would be their duty to find the prisoner guilty; for, in the opinion of the Court, the pretence set forth in the indictment was within the act.

He was convicted, and sentenced to the penitentiary eighteen months.

(ATTEMPT TO BURN.)

ELIZA ORR'S CASE.

VAN WYCK, *Counsel for the prosecution.*

PRICE, *assigned by the Court Counsel for the prisoner.*

To attempt to fire a house is a misdemeanour at common law.

The admission of one called as a witness that he had been convicted of a felony, does not render him incompetent as such; the record of his conviction must be produced, but the Jury ought to place no reliance on his testimony, unless corroborated.

The prisoner, a black girl, during the term of November last, was indicted for a misdemeanor at common law, in attempting to burn the house of William Tate, on the 21st of October last.

It appeared from the testimony of Tate, the examination of the prisoner in the police, and from her confession to Reuben Clark, captain of the watch, on being apprehended, that the prisoner, about eight o'clock in the evening of the day laid in the indictment, in consequence of a quarrel with her sister about some furniture which was in the tenement in question, in Bancker-street, a part of which was occupied by both of them, and the other by Tate, procured some cooper's shavings, which she placed on the outside of the house against the weather boards, and set fire to them, which burned the boards considerably; and, while she was in the act, was asked by a black man what she was about, to which she replied, that she would burn the old rookery down. He took her away, and prevented the accomplishment of her design.

Tate, on being cross-examined, admitted, that he had been convicted in this Court for *an attempt* to steal a bag of sugar, and had been sentenced to the penitentiary.

Price objected to the testimony of this witness, because it appeared that he had been convicted of an infamous crime.

By the Mayor. You must produce the record. No admission of the witness will supersede the necessity of this formality. The evidence, as it stands, affects his credibility only, not his competency. It is true, there is little reason for this rigid rule, but Courts must adhere to it, and the question of credibility must be referred to the Jury, who would be bound to discard the testimony unless corroborated.

After the arguments of the respective counsel, the Mayor charged the Jury, in effect, that if the proof in the case depended wholly on Tate, it would be their duty to acquit. But there was sufficient proof in the case, independent of his testimony, to support the prosecution; and, in the essential particulars, that testimony appeared to be corroborated, and was, therefore, entitled to credit. Should the Jury believe, that the prisoner put the fire to the shavings in such a situation as to fire this building, it would be their duty to convict her.

The Jury found her guilty, and she was sentenced three years to the penitentiary.

SUMMARY FOR JANUARY, 1821.

ROBERT M. GOODWIN.

At the last Court of Oyer and Terminer, held in and for this City and County, on the 11th day of December last, on the opening of the Court, Van Wyck, on calling on this defendant, who did not appear, said that he had summoned the witnesses, and was ready to proceed to trial in the case, and he wished this to be distinctly understood.

Messrs. Stephen Price and Ogden, Counsel for the defendant, suggested to the Court, that the reason why he did not appear was, that he was not recognized to appear in this Court.

Judge Van Ness said, that he thought it proper, for the satisfaction of the community, that the reason why the defendant was not tried now should be known.

A *certiorari* to remove this case from the Sessions into the Supreme Court, returnable at the last May term, had been granted on his behalf. During that term, a motion was made for his discharge, and a question arose, whether he should be tried in the Sessions, the Sittings, or the Court of Oyer and Terminer, in case it should be determined that he should be again tried. The Court advised the district-attorney not to file the *certiorari* in the Supreme Court, until he received the order of the Court to do so, when the respective questions should be decided.—During the last August term, in Albany, the Court unanimously determined that the defendant should be again tried, and ordered his trial for the then *next Sittings*. The district-attorney did not attend at Albany, and received no direction from the Court relative to filing the *certiorari*. It was not filed. The defendant appeared on the first day of the Sittings, but as the *certiorari* was not filed, the district-attorney did not consider it adviseable to bring on the case. The reason why the defendant does not now appear is, that he is not bound to do so; and why he is not tried here, is not attributable to the fault or neglect of any one. The Supreme Court, at the next term, contemplate making a further order in this case.

During the term of January, held at the Capitol, in the City of Albany, on the first day of January instant, we understand that the defendant appeared, and that the motion for his discharge was renewed by E. Williams, his counsel, and opposed by T. J. Oakley, the attorney-general, when the Court denied the motion, and determined that the defendant should be tried at the next *Sittings*, in this city.

SESSIONS.

GRAND LARCENY.

Lewis Mitchell and *Francis Mersereau*, blacks, indicted with Charles Halsey, a white man, for this offence, in breaking open the store of Joel Ketchum, (204 Pearl) and stealing a large quantity of dry goods, amounting to seven or $800, on the 28th of December last, were convicted, and Mitchell was sentenced seven years to the state prison. It appeared that Bancker-street was the residence of the thieves, and the house of Anthony Lyon, in Harman-street, about three doors from Rutgers-street, their rendezvous, and that Azel Conklin and Francis Tilou, police-officers, ferretted them out, and recovered a large trunk of the goods at the house of one Robertson, in Pell-street. A marling-spike, and other instruments for breaking open doors, were found by Conklin at Lyon's house.

Robert Sales was convicted, on his own confession, for being concerned in the same felony, and was sentenced three years to the state prison. *John Brown*, *Phebe Livingston*, and *Eliza Lambert*, blacks, were also indicted, and tried for stealing the same goods, but were acquitted. The sentence of Mersereau was suspended.

Daniel Guche and *Joshua Cornish*, being severally indicted for this offence, the former for stealing the goods of William Weyman, and the latter those of David Leavitt and others, were convicted, on confession, and sentenced to the state prison three years each.

PETIT LARCENY.

Hannah Brown, *John Jacobs*, *Nicholas Moore*, *Jacob Wilson*, *John Perry*, *Lewis Weaver*, *Charles Hamilton*, *Harry Townsend*, *John Gerard*, *Joseph Bevins*, *Adam Walker*, *Ann Saunders*, and *Michael Preston*, were severally indicted and convicted of this offence, and the one first named was sentenced to the penitentiary eighteen months, the two following sixteen months each, the two following fifteen months each, the five following for six months each, and the remainder for shorter periods.

ASSAULT AND BATTERY—OUTRAGE—MISDEMEANOR.

John Ellis was indicted, tried, and convicted of this offence, committed on Mary Whitaker, a married woman, and fined $200 and the costs. The defendant, and two or three other lads of spirit, seized the prosecutrix, near the corner of Pearl and Cross-street, at about nine o'clock, on the evening of the 6th of November last, and tore off her head-dress and other clothing, and abused her with the most opprobrious language, supposing her to be a woman of ill fame. Discovering their mistake, two

of them, against whom separate suits had been commenced for damages, compromised, and paid the husband of the prosecutrix $100 each. There is such a suit now pending against the defendant.

John Flint was indicted, tried, and convicted of this offence, committed on Samuel I. Camp, on the 20th of December last, and was sentenced to imprisonment in bridewell six months.

While the prosecutor, who is an old man over sixty, and a watchman, was near Catherine-Market, proceeding down Cherry-street, having in charge two small children, the defendant, a serjeant in the service of the United States, accosted him, and asked him if he wanted to buy a shirt. The prosecutor answered, no; and, as they arrived near the New-slip, on the corner of which and Cherry-street, a rendezvous for enlisting soldiers is located, the defendant asked the prosecutor to go in and take a drink, but the prosecutor told him it was not his practice, when the defendant told him that he must go in; and, on receiving a positive denial, took the prosecutor by the shoulder, and dragged him forcibly into the rendezvous, saying, "Here is a coat you stole: it is United States' property!

The defendant then stripped off the prosecutor's great coat, and three or four more soldiers immediately joined the defendant in the outrage which he had committed. Two of them, armed with muskets, having fixed bayonets on them, penned up the prosecutor, and kept him a prisoner about three hours; and, during this time, one of them, Valentine Durand, drove a Mr. Hitchcock, and other citizens, who began to collect for the purpose of taking measures to release the prosecutor, off the steps of the rendezvous with a fixed bayonet; and, as the people were pressing up, the defendant ordered the armed soldiers *to do their duty*. At length, Frederick Seely, and other citizens, came, and demanded that the prosecutor should be released. He was suffered to go; and, shortly afterwards, Philip Garniss, a police officer, came and arrested the defendant; and, when the officer came, he saw the two men armed as aforesaid.

On the trial, Patrick Boiland and Valentine Durand, swore positively, that at the time the prosecutor was in the rendezvous, none of the soldiers were armed, nor were there any arms there; and, it appeared from the testimony of Captain William Browning, that it was contrary to orders for any of the soldiers there to carry arms; and, that he was in the rendezvous a short time after the affair occurred, and saw no arms there. But, on the part of the prosecution, it was sworn positively, by five respectable witnesses, that they saw the two soldiers armed, as before related; and several of those witnesses identified *Boiland* and *Durand*, as the men thus armed. Moses Knapp also testified, that on the day previous to the trial, in the court-room, he overheard the defendant, in conversation with some of the soldiers, who were produced as witnesses, say to them, (speaking of the prosecutor,) "He will not dare to show his face here: we have more witnesses than he, and can outswear him. You can swear there were no arms there!"

Mr. Price abandoned the defence, when the Court ordered the defendant to be taken into custody; and, on motion of the public prosecutor, made the same order with regard to *Boiland* and *Durand*, and they were both committed to answer for wilful and corrupt perjury.

The prosecutor, in the course of his testimony, stated, that some time before, he purchased the coat, which was exposed for sale, near Catherine-Market, by a man, who alleged, that he had been a soldier; but, before the prosecutor purchased the coat, he took the precaution of making inquiry of a serjeant, whether it would be lawful to do so, and was told by him, that it would. And while the prosecutor was in custody, he told the defendant how the coat was obtained.

Jersey Gardner, a black, was indicted for a misdemeanor at common law, in breaking open the store of William Adee, with an intent to steal his goods; and, on being arraigned, pleaded guilty, and was sentenced to the penitentiary two years and a half.

This is the first conviction for such an offence that has come under cognizance in this Court for five years. If not a *new offence*, it certainly comes very near one.

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On an indictment, containing two counts each, alleging, that an assault and battery was committed by four persons, the Jury may find the whole guilty, though it may appear in proof, that three of them only were engaged together at the same time, in committing such offence; and that one of them, at another time, committed the offence on the same person as the others did; and, in such case,

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A voluntary confession in the case of a misdemeanour, reduced to writing before a magistrate, though not a confession authorized to be taken by him under the statute, as in a felony, may be read in evidence, 5

Where the complaint of the prosecutor was reduced to writing in the police, and the confession of the prisoner followed, stating that "*the charge in the foregoing affidavit is true*," and further, "*that he obtained goods by false pretences from several persons*" not named in the indictment, it was held that such confession, so referring to an affidavit which neither was nor could be given in evidence, should have no influence with the jury, *ib.*

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An allegation in such indictment, that the defendants did conspire, &c. "to cheat, defraud, and from him obtain $200," is

sufficiently explicit to charge them with conspiring "to cheat and defraud" the person whose name in the indictment is the antecedent to the word *him*; this pronoun being understood immediately after the governing verbs "to cheat and defraud," *ib.*

A. B. and C. agreed together that A. who was not responsible, should go to D. E. and F. respectively, and fraudulently purchase goods of each of them, on credit, representing himself as a person of wealth and credit, and uniformly referring the owners of the goods, for information as to his standing and competency, to B. who, upon every such application, should falsely represent that A. was a person of wealth and credit, for the purpose of inducing the said owners to trust A. upon his sole responsibility; and that he, after having so obtained the goods, might deposit them in the custody of B. and C. the more easily to convert them to their own use, without paying any adequate value therefor. It was held that such an agreement is a conspiracy, 129

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Though a man may have been deceived in receiving a counterfeit bill, having paid for it the full consideration; yet, if he has afterwards *reasonable grounds* for believing it to be counterfeit, and passes it, he subjects himself to the punishment prescribed by law for passing counterfeit money, knowing it to be counterfeit, 1

It is not necessary, in such cases, for the public prosecutor to show that the prisoner knew, to an absolute certainty, that the bill so passed was counterfeit, *ib.*

M. who had been deceived by a counterfeit bill, passed it to A. in New-York, who gave him a draft on a house in Philadelphia; but, shortly afterwards, discovering the bill to be counterfeit, directed his Philadelphia correspondent to withhold payment, and when M. called, refused payment, who commenced a suit for the recovery of the money; and, on the trial, A. produced ample testimony, establishing that the bill so passed was a counterfeit, and a verdict was rendered in his favour. M. afterwards obtained possession of the bill, showed it to several persons, some of whom told him it was good, and others that it was bad. G. at the instance of M. and in consideration of $5, to be spent between them, passed the same bill: It was held, that the result of that suit furnished reasonable grounds for M. and G. to believe the bill counterfeit; but as G. was a volunteer in the passing of the bill, and M. had been originally deceived and had lost the amount, the Jury convicted G. but acquitted M. *ib.*

Where a man who had reasonable grounds for believing a note bad, carried it to another, and told him he wanted to know if it could be discounted, and left it for examination, this is not a passing with an intent to defraud, *ib.*

The mere fact of passing a single counter-

feit bill, not accompanied with circumstances, from which a deduction can be fairly drawn, that the prisoner knew it to be bad, is insufficient to produce a conviction, 74

Where a prisoner is tried the second time for passing counterfeit money, the particular circumstances, upon which the former prosecution was founded, may be given in evidence, *ib.*

It seems, however, that where a prisoner has been *acquitted* from such charge, that the Jury ought not, on the second trial, to lay great stress on the circumstances of the former trial; and the Court will not go so far as to admit the former examination of the prisoner to be read, *ib.*

To constitute forgery, it is not necessary that the name of any person in existence should be forged, 87

Where the prisoner, on passing false paper, alleges it to be that of a particular person in a particular street in a city, if on the trial it appears that such a person resides in that street, some evidence should be produced by the public prosecutor, to show the signature not to be that of such person; but if no such person resides there, some evidence should be produced of the fact, *ib.*

To constitute the possession of counterfeit money, it need not be found on the person; it is sufficient if it be under the control of the prisoner; and this may be inferred from the circumstances, 115

A bill on a particular bank, alleged to be counterfeit, cannot be proved to be so by a witness, who testifies merely from its general appearance, without knowing even the names of the President and Cashier of the Bank, 176

A bill, alleged to be counterfeit, was set forth as a bill on a particular bank; but, on the face of the bill, a joint promise was set forth, commencing with the words, "We promise to pay, &c. to A. B. "at the Bank," &c. and purporting to be signed by persons, as President and Cashier, who were not, in fact, the officers of that Bank; and, for aught that appeared, were fictitious persons; it was held, that in such a shape the prosecution could not be maintained, *ib.*

Where a quantity of counterfeit bills are found in the possession of a man at the same time, he cannot be subjected to more than one prosecution for counterfeiting, passing, and having them in possession, with an intent to pass them, as this is but one offence, 179

D.

Damages.

Unless the damages rendered on an inquest, for an assault and battery, appear, at first blush, enormous, the Court will not interfere, 85

That a Jury, for the purpose of arriving at a measure of damages for an assault and battery, agreed that each should mark down a sum according to his opinion, and then that the amount should be divided by 12, and that the quotient thence arising should be the verdict, is an irregularity sufficient to destroy such verdict; but this cannot be shown by the affidavit of the Jurors, and much less from the affidavit of one who heard it from one of them, *ib.*

See Mitigation of Damages.

Duty of Peace Officer.

For an officer, with an execution, merely to call on a debtor with it, and take no inventory, is no levy on the goods, and if he afterwards break open the door to seize the goods, he becomes a trespasser, 141

Where a dangerous wound has been inflicted, and the wrong doer secures his door against a peace officer, who comes to arrest him for inflicting such wound, it is his duty, before breaking open the door for that purpose, to demand admittance; for if he does not, a breach and entry will render him a trespasser, but of the lowest grade, *ib.*

Where such wound has been inflicted, any one, without warrant, has a right to arrest the offender, *ib.*

E.

Evidence.

An inquest will not be set aside, on the ground of newly discovered evidence, where the witness to the fact relied on, was examined on such inquest, though such fact may not have been elicited, 86

Declarations made by the prisoner at the

time an offence is committed, may be given in evidence in his favour, as part of the *res gestae*, but not those made subsequently, 171

Examination of Prisoner.

The magistrate before whom an examination is taken, is a competent witness to testify to acts done by the prisoner before him, but not to declarations forming part of such examination, 171

Where a prisoner, in his examination before a magistrate for a specific offence, discloses matters material to the prosecution on the traverse of an indictment for another offence, it was held that such examination might be read on the traverse of each indictment, *ib.*

Examinations of prisoners before a magistrate stand on the same footing, in Courts of Justice, as their declarations reduced to writing before any individual would, *ib.*

Whatever is reduced to writing before a magistrate, and forms part of the examination of the prisoner, is not the subject of parol testimony, 174

See Confession.

Forgery.

See Counterfeiting.

F.

Fraud.

Though the false pretence charged, must be the sole inducement to the parting with the goods, yet every accidental circumstance which, in conjunction with the false pretence, influenced the delivery, need not be alleged, 5

Where one by a false pretence, obtained property, in which he succeeded with the greater facility by reason of his being recognized by the prosecutor as having been in his store before, it was held that this was but a circumstance incidental to the delivery, and not such an inducement as required notice, *ib.*

W. the owner of goods, on going to a foreign port, left them in charge of T. a clerk, from whom they were obtained by false pretences, and the indictment alleged that the prisoner so obtained them, with an intent to defraud T. It was held that the indictment, in that respect, might be maintained, 74

For a man falsely to pretend that he is the captain of a vessel from a foreign port, just arrived; and, by that means, to obtain goods, is a false pretence within the act, 180

See private Fraud—Judgment Bond.

G.

Gambling.

To keep instruments of gambling in a house, and permit persons to play for small sums, merely sufficient to pay for the use of such instruments, or for drink; this being more pernicious than gambling on a high scale, 136

Grand Larceny.

To convict of grand larceny, the Jury must be satisfied that the prisoner stole property to the amount of more than twenty-five dollars, set forth in one and the same count in the indictment; and they cannot take a part of that sum contained in one count, and add it to a part in another count, where they find the amount of the property stolen in each count to be less, 174

See Larceny.

I.

Indictment.

Though a judge at *nisi prius* may not undertake to quash an indictment sent down by the Supreme Court, to be tried before him, yet he will refuse to hear evidence, affecting the moral character of an individual, on a particular count, which does not contain a criminal offence, 79

Quere: Whether, on a motion in arrest of judgment, an indictment for grand larceny against three persons, containing a count against a fourth, for receiving the same goods, mentioned in the counts for grand larceny, knowing them to have been stolen, is good after verdict against the three, the fourth not having been tried, 89

The time stated in an indictment is not material, nor traversable; but if an impossible day be laid, it will be a fatal defect, 108

See Assault and Battery—Coining—Counterfeiting—Ownership—Variance.

Infancy.

An Infant under seven years is incapable of committing crime. Between that age and fourteen, if it appears on the part of the prosecution, that the infant is possessed of sufficient capacity, he may be convicted; but, as his age approximates the nearer to that of seven, the inference in his favour is the stronger; and, as his age approximates the nearer to fourteen, the inference in his favour, on the score of infancy, lessens, 137

If the circumstances under which a felony is committed by an infant, between seven and fourteen years of age, indicate that he was conscious that he was doing wrong while stealing, this is tantamount to evidence of his capacity, 178

Infanticide.

On the traverse of an indictment against the mother for the murder of her infant, though circumstances may be overwhelming, the Jury may acquit, 70

Interest of the Court.

An objection to one of the members of the Court sitting to try a prisoner, on the ground of interest, should be made before any witnesses have been sworn, and the trial has progressed, 179

J.

Jeopardy.

That no person shall "*be subject, for the same offence, to be twice put in jeopardy of life or limb,*" is a fundamental principle of the common law, and as such, is obligatory on all Courts; and whether that clause, in the amendments to the constitution of the United States, was intended to bind the State Courts, is, therefore, immaterial: but no man, in a legal sense, can be said to have been "put in jeopardy of life or limb," unless he has been *acquitted* or *convicted* by the verdict of a Jury, 97

Judgment Bond.

Though it is a rule that a man shall be estopped from impeaching a judgment confessed by himself, yet the rule does not apply to a criminal case, wherein the judgment is alleged to have been obtained fraudulently by a third person, 79

L.

Larceny.

When a prisoner intending to steal fowls, broke open a hen-house in the night, and being caught by the owner in the hen-house, fled and carried away the padlock by which the door was secured; it was held, that he could not be convicted of stealing the lock, if either through alarm, or from any other motive than an intent to steal he took it away, 8

Quere: Whether a padlock by which an out-house is secured, is a fixture attached to the freehold, *ib.*

Where several go to a place to steal, and one of them removes the goods to a convenient place for the other to carry off, where they remain some time, and are then carried off by the coadjutor, he is guilty as a principal, 94

No bond of union can bind thieves to each other, *ib.*

The least removal of property from the place where it is deposited, is a sufficient *carrying away* to constitute larceny, 169

Authorities on this subject cited, *ib.* n.

M.

Manslaughter.

If one be killed, even accidentally, through the instrumentality of another, engaged in an unlawful act, the killing amounts to manslaughter.

G. in the street, pointed with his cane, containing a dagger, at S. as he approached, and said, "There is a scoundrel and a coward;" and, as S. passed, continued to point the cane, and repeated the same words. S. passed a few steps, and returned to G. saying to him, "Will you repeat what you said?" G. replied, "I will." S. with his fist immediately struck G. a blow on his breast, who struck S. over the head with the cane, the sheath part of which flew partly off. G. then took the dagger part by the blade, and with the handle of the weapon followed his blow on the head of S. who retreated and fell. S. in the affray

was mortally wounded, the dagger having passed through his heart. No person saw G. stab S. though several persons saw the affray. G. was indicted for manslaughter; and the indictment alleged the *means* of the death to be, that *G. with a certain drawn dagger, held in his right hand, struck and pierced S.* giving him one mortal wound, &c. It was held, 1. That whether, by accident and without the intention of G. S. fell on the dagger, while entangled in his clothes as he fell, or while held in the hand of G. or whether the wound was inflicted *intentionally*, by a thrust, G. was guilty of manslaughter. 2. That the indictment was supported, should the Jury believe that the wound was the result of a fall on the weapon, through the instrumentality of G. 3. That G. during the affray, was engaged in an unlawful act.

One who had inflicted a wound on another, with a dangerous weapon, and driven him from his house, secured the door; and, shortly afterwards, a peace officer with others came, and without demanding admittance, broke open the door, to arrest the offender, who refused to submit, and struck such officer a mortal blow, of which he died; it was held, that if at that time the prisoner harboured the felonious intent of killing, he was guilty of murder; but, that if he was actuated merely with an intent of defending his own house from invasion, and actually believed he had a right to do so, though this idea was erroneous, he was guilty of manslaughter only, 141

See Bail in a Criminal Case—Duty of Peace Officer.

Marriage.

Evidence of the declarations of the prisoner, that he called a woman, whom he introduces as a witness in his behalf, and that he lived with her as such, will be sufficient to disqualify her as such witness; but a written instrument between a man and woman, by which they agree to live together as man and wife, as long as they can agree, does not consitute a marriage, and cohabitation under such an agreement is abominable, 141

Mitigation of Damages.

A previous conviction and fine, in the sessions, for an assault and battery, ought, on a trial for the same offence, in a civil tribunal, to go in diminution of damages on the score of *public example*, but not for the *private injury*, 65

N.

Notice of Special Matter.

See Slander.

O.

Ownership.

Property having been assigned for the benefit of creditors, and sent by the debtor, as agent for assignees, to auction, for sale, was stolen, and in the indictment, the ownership was laid in the debtor; it was held that the ownership ought to have been laid in the assignees, 4

One cannot be convicted of stealing property, the ownership of which is alleged in the indictment to be in himself and another person, 117

See Burglary.

P.

Pardon.

What excellent effects flow from a mild system of punishment? How efficacious are pardons? 76

Personal Identity.

So striking was the resemblance between Hoag and Parker, that the wife of the former swore positively that the latter was her husband; and in this she was corroborated by a number of other witnesses, some of whom, among other marks of the identity of Hoag, described a remarkable scar on one of his feet. On the other hand, their testimony was as positively contradicted by a number of other witnesses. On examination, no scar was found on Parker's feet; and this turned the scale of testimony, 124

Possession of Stolen Property.

The possession of stolen goods is not always evidence that the prisoner is the

felon, and such possession may be accompanied with circumstances which destroy the presumption of guilt, 178

Practice in the Sessions.

One indicted for a felony must sit in the prisoner's box during trial, unless on bail; in which case, he or she may sit by his or her counsel, 164

Power to Discharge a Jury.

In a case of felony, in the Court of General Sessions, in New-York, after a trial of five days, the Jury were kept together seventeen hours to deliberate on a verdict, and after eleven o'clock in the evening of the last day of the term, returned into Court, and declared there was no probability of their agreeing on a verdict, and were discharged—it was held that such discharge was a discreet and legal exercise of the powers of that Court, and did not operate as an acquittal of the prisoner, 97

In cases, as well of felony as misdemeanor, where an absolute necessity exists for discharging a Jury, the Court, in its discretion, may discharge them, and the prisoner may be again brought to trial for the same offence, *ib.*

See the case of Hauxhurst, 2d vol. of the City-Hall Recorder, p. 33, and authorities collected, ib. p. 35, n.

Where an indictment for a felony alleged the offence to have been committed *on a day subsequent to that on which the indictment was found*, it was held that a Juror might be withdrawn, and the Jury discharged without consent, and the prisoner brought to trial, for the same offence, on another indictment, 108

See Manslaughter.

Private Fraud.

Where an indictment at common law alleged a fraud of a private nature, committed by an attorney, though not in that capacity, it was held that the indictment could not be maintained, 79

An indictment stated in effect, that an Attorney advised his client to confess a judgment, to save his property from other claims: and after such judgment had been confessed by the client, in favour of such attorney and others, and entered up by him, that he caused the property to be sold on the execution, and bid off for his own benefit, at an inadequate sum; and that he kept the property and converted it to his own use. It was held that such charge was insufficient to support a criminal prosecution, and that the act constituting the *gravamen* of the charge, was not done by the attorney, in his official capacity, *ib.*

Professional Men.

Professional men are properly called as witnesses to state facts and opinions *within the scope of their profession*; but not to give their opinion on things, of which the Jurors themselves can as well judge, 26, 31

Prudence.

The most experienced and consummate villains, who devise and execute the most cunning schemes, (it is wisely ordered,) are destitute of common prudence, 89

It is highly imprudent to attempt the arrest of one known to be a desperate man, without competent means of preventing him from doing mischief, 141

Regularity of Mesne Process.

A *capias* against a prisoner on the limits, and his bail, tested at New-York, on the 15th of May, 1819, and returnable the first Monday of August then next, at Albany, was put into the hands of E. B. with express authority from the plaintiff's attorney, to alter the test, and return, in case it should not be found necessary to deliver it to the sheriff before its return, and in case the prisoner should be found off the limits, after its return. E. B. in pursuance of that authority, altered the writ, by testing it the 3d day of August, 1819, returnable the same day at Albany, and delivered it to the sheriff, who, on the same day, arrested the defendants: it was held, that the process was regular, 96

S.

Slander.

An action of slander will not lie for charging another with the forgery of an inst-

ment which is not the subject of that crime, 52

A declaration in slander alleged that A. said of C. "He committed perjury," and on the trial it appeared that a witness said to A. "I hear that you have accused C. of perjury," to which A. replied, "I will tell you how it was," and then proceeded to relate the history of a suit before a justice, (as told by B.) wherein C. was sworn as a witness, and concluded the relation by saying, "If what B. says be true, C. has sworn false." It was held, that this was sufficient evidence of speaking the words, to put A. on his defence, *ib.*

Where, in an action of slander, in charging one with forgery and perjury, the defendant plead the general issue, accompanied with a notice of special matter under the statute, that on the trial he would prove the charges to be true; it was held, that the notice could not operate to assist the plaintiff in making out his case, should there be a deficiency of proof on his part, in speaking the words, and that under this state of the pleadings, the defendant was not precluded from urging to the Jury that the plaintiff had not proved the speaking of the words, but, if he had, that they were true, *ib.*

A notice of justification in slander, where the defendant fails in justifying, is a ground for exemplary damages, when mitigatory circumstances do not exist, *ib.*

Where a clergyman was accused of perjury, and the defendant on the trial undertook to justify, though the Jury may not consider the justification *fully established*, still, should they believe the plaintiff's conduct in the transaction upon which the justification is attempted to be founded, highly reprehensible, and utterly inconsistent with the sacerdotal character, they ought not to render a verdict in his favour for heavy damages, *ib.*

Slave Trade.

Under the Act of Congress, passed May 10th, 1800, sec. 2d, it was held, that the captain of a vessel, employed or made use of in the transportation of slaves, is amenable to the penalties imposed, 120,

It was held, that it was not necessary that any slave should be actually put on board such vessel; but that it was sufficient if the crew was engaged on the coast of Africa, in procuring slaves, and sending them to any other place by another vessel, *ib.*

It is an indictable offence, under the Act of Congress, of 1818, to fit, equip, load, or otherwise prepare any ship or vessel, in the United States, for the purpose of procuring slaves from any foreign place, to be transported to any other place, 122

Where a statute gives a public remedy, by imprisonment, for any public offence, but is silent as to the mode of proceeding to effect that remedy, it shall be intended that an indictment will lie, *ib.*

Where a statute prohibited the equipment of any vessel, for the purpose of procuring slaves from any foreign kingdom, place, or country, to be transported to any port or place whatsoever, and the indictment alleged that the defendant equipped a certain vessel, &c. for the purpose of procuring slaves from a foreign country, *to the Jurors unknown*, to be transported to a place *to the Jurors unknown*, and on the trial it appeared, that the place from which the slaves were to be procured, and that to which they were to be transported, were both known to the Grand Jury who found the indictment; it was held, that such prosecution could not be supported, *ib.*

Son Assault Demesne.

The defendant in an action for an assault and battery, who pleads *son assault demesne*, holds the affirmative; and, therefore, his counsel have a right on the trial to open the case and introduce testimony; but, if it appear, from all the evidence, that he commenced the assault, the plaintiff's counsel have a right to open the case and conclude, 62

It is a general rule, that the party holding the affirmative on the record, has a right to open the case and conclude, but not where all the testimony negatives his affirmative allegation, *ib.*

T.

Testimony.

The admission of testimony at any stage

in a criminal case, rests in the sound discretion of the Court; and where the testimony had closed on both sides, and the counsel for the prisoner, in his remarks to the Jury, insisted on an acquittal, because the district-attorney had not proved that the property belonged to the person mentioned in the indictment; it was held, that he might recall and examine the principal witness in the case to that point, inasmuch as this omission, during his previous examination, was the result of mistake, 164

Where there is ample testimony, which is not impeachable, to support that which is necessary to establish, to produce additional testimony, but of a contrary character, may destroy the case, especially if this additional testimony be relied on, 165

V.

Variance.

An indictment alleged, that a bond was conditioned for the payment of $657: but the condition was for the payment of that sum, *with interest*, it was held that this variance was fatal, 79

See Indictment—Slave Trade.

Verdict.

See Damages.

W.

Witness.

The admission of one *called* as a witness that he had been convicted of a felony, does not render him incompetent as such: the record of his conviction must be produced, but the Jury ought to place no reliance on his testimony, unless corroborated, 181

See Approver—Evidence—Testimony.